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760117—47——1

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 237

LEOPOLD WILLIAM BRANDENBURG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 449–456) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered July 2, 1947 (R. 457). The petition for a writ of certiorari was filed July 31, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the trial court properly submitted the issue of entrapment to the jury.

2. Whether a layman's testimony that a physician subjected him to no examination whatever is inadmissible as a conclusion as to what constitutes a medical examination.

3. Whether there was a fatal variance between the allegations of the indictment and the proof.

4. Whether a physician's admission that he had been prescribing morphine for two patients, one of whom he had never examined and the other of whom he had never seen, was admissible to show lack of good faith in his narcotic practice generally.

STATEMENT

On January 30, 1945 (R. 1), an indictment in eleven counts (R. 5–20) was filed in the District Court for the District of New Jersey charging petitioner, a practising physician, with violating Sections 2554 and 2557 (b) (1) of the Internal Revenue Code (26 U. S. C.) by selling morphine sulphate tablets not in pursuance of written orders of the purchasers on forms as prescribed, and not in good faith and in the course of his professional practice only, but with the intent that the drug should be used by the purchasers to satisfy their cravings therefor and addiction thereto, the sales being effected by the issuance of

prescriptions thereafter filled by druggists. Each count was identical except as to the date of the sale, the quantity of the drug sold, and the identity of the purchaser. The first six counts charged sales to one James Humphries, and the last five charged sales to one Ralph Van Pelt. Following a conviction on all counts and a reversal and remand for new trial on grounds not here material (R. 1–2; see *United States* v. *Brandenburg,* 155 F. 2d 110), petitioner was again tried before a jury, found not guilty on the first count and guilty on all others (R. 3), and sentenced to five years' imprisonment on each of the ten counts on which he was convicted, the sentences to run concurrently (R. 4). On his second appeal to the Circuit Court of Appeals for the Third Circuit, the judgment of conviction was affirmed (R. 457).

The evidence adduced by the Government may be summarized as follows:

Humphries, a merchant seaman by profession (R. 22), testified that he first met petitioner in the latter's office in Union City, New Jersey, about the middle of April 1944 (R. 24). Humphries was a drug addict at the time and throughout the period of the offenses alleged in the indictment (May 12 to September 12, 1944), though he was cured of his addiction approximately 18 months prior to the trial (R. 23, 52). He told petitioner that he was suffering from "gallstones" and that a Doctor

Brady had been prescribing for him, but that Doctor Brady "was ill and out of town" (R. 26). Actually, Humphries had no painful symptoms other than a craving for morphine (R. 58). Petitioner asked Humphries what he wanted. Humphries said he "would like to have a prescription for morphine sulphate." Petitioner asked him "how much." Humphries said he "didn't know exactly how many I would need." Petitioner asked if "75 tablets [would] be enough." Humphries replied that he thought so. Petitioner then wrote a prescription for 100 tablets and suggested that Humphries have it filled at Marra's Pharmacy in Secaucus, New Jersey. (R. 26.) Humphries paid petitioner five dollars after receiving the prescription (R. 27–28). He was not required to undergo any examination "of any kind" (R. 27).

Humphries presented the prescription to Marra's Pharmacy, but the pharmacist refused to fill it and called petitioner on the telephone (R. 28). Humphries then returned to petitioner's office and told petitioner that "Mr. Marra wouldn't fill the prescription for 100 tablets." Petitioner said, "Yes, I just spoke to him on the phone. * * * I will give you two prescriptions for 50 each." Petitioner then gave Humphries two prescriptions for 50 tablets of morphine sulphate each, and Humphries had these filled. Petitioner did not ask Humphries to surrender the

original prescription, and Humphries retained it. (R. 29.)[1]

Some time in March 1944, Humphries had commenced to act as an informer for the Federal Bureau of Narcotics under the supervision of agent Belmont. He "volunteered information" and "assisted [Belmont] in the investigation of narcotic violations," receiving a subsistence allowance of approximately five dollars per day for the days he actually worked in this capacity. (R. 170.) There is no evidence, however, that Humphries' visits to petitioner and his procurement of morphine prescriptions from him in April 1944 (supra, pp. 3–4) were in any way connected with his activities as an informer.

Belmont testified that he first began to investigate into petitioner's activities on May 11, 1944, when Humphries showed him "a prescription on the stationery of Dr. Brandenburg," this being the 100-tablet prescription for morphine sulphate which Humphries received from petitioner in

[1] This prescription was subsequently filled on May 13, 1944, shortly after the Federal Bureau of Narcotics, on information supplied to it by Humphries, commenced an investigation into petitioner's narcotic practice (*infra*, pp. 5–6), (R. 172). The sale of morphine sulphate alleged in count 1 of the indictment, on which petitioner was found not guilty, was predicated on the issuance and filling of this prescription (R. 5, 108–109). The money used in having this prescription filled was government money, but the five dollars which Humphries paid to petitioner when he received the prescription was his own (R. 108).

April and which he had been unsuccessful in having filled (R. 149, 172; see R. 40). As a consequence of seeing this prescription and talking to Humphries concerning the circumstances under which he received it, Belmont made a report to his district supervisor in New York, consulted with him, and received permission to begin an investigation into petitioner's narcotic practice (R. 149). In order to obtain corroboration of Humphries' statements to him concerning petitioner, Belmont requested the district supervisor to "assign a narcotic agent to work under cover and pose as an addict in order to obtain further evidence." Such a procedure was agreed upon, and agent Van Pelt was given the assignment. (R. 150.)

Beginning on or about August 8, 1944, "supervised purchases" by Humphries from petitioner commenced, as follows: Belmont would accompany Humphries to the vicinity of petitioner's office, search Humphries to ascertain that he had no prescriptions on his person and give him money. Humphries would go to petitioner's office and return in a few minutes with either one or two morphine prescriptions, which he would then have filled at various pharmacies under Belmont's observation. Van Pelt commenced making similar "supervised purchases" from petitioner on or about August 22, 1944. (R. 151.) This procedure continued until September 12, 1944, when petitioner was arrested (R. 152–154).

Humphries testified that his first visit to petitioner's office following his two visits on the same day in mid-April 1944 (*supra*, pp. 3–4) was in the middle or latter part of June 1944 (R. 29).[2] He told petitioner he "was back" and petitioner prescribed more morphine sulphate for him. Humphries testified that his last visit to petitioner in connection with obtaining prescriptions was on September 9, 1944, and that between these dates he visited petitioner "numerous times," each time receiving a prescription for morphine sulphate and each time paying petitioner five dollars. (R. 30–31, 37.)[3] On no occasion did petitioner ever examine him (R. 31). Humphries gave some of the prescriptions to agent Belmont, while others he "had filled and used the narcotic myself" (R. 34). He estimated that, all told, he received from petitioner 125 prescriptions totaling between 2500 and 3000 tablets, some being quarter-grain and others half-grain tablets (R. 37).

Some time in August 1944, Humphries further testified, he told petitioner that "the narcotics which I had been getting I had not been

[2] This was before his visits under Belmont's supervision commenced (*supra*, p. 6).

[3] It appears that the money paid by Humphries in connection with the "supervised purchases" was government money supplied by Belmont, but that on the occasions when Humphries received prescriptions while not under surveillance, he used his own money (see R. 106–109).

using all of them myself; my brother-in-law had been using part of them." Petitioner observed in reply that Humphries "had been getting too many for any one man to use," and told Humphries that he "could bring [his] brother-in-law around." (R. 32.) Shortly thereafter Humphries introduced Van Pelt to petitioner as his brother-in-law (R. 33).

Van Pelt testified that on August 22, 1944, when he was introduced to petitioner as Humphries' brother-in-law, he (Van Pelt) said to petitioner, "Dr. Brandenburg, I suppose that Jimmy has told you all about myself." Petitioner replied, "Yes. * * * How long have you been suffering from tuberculosis?" Van Pelt answered, "I had my left lung collapsed about eight years ago. I am addicted to morphine. * * * Occasionally I suffer from pleurisy pains." Petitioner then asked Van Pelt if he "was being treated by Dr. Brady." Humphries answered "yes" for him. Petitioner then prescribed 25 quarter-grains of morphine sulphate for Van Pelt. (R. 110–111.) Van Pelt asked petitioner how much he owed him, and petitioner replied, "$5 for the first visit," which amount Van Pelt paid. No X-ray was taken, nor was an X-ray suggested, nor was there any other kind of examination. (R. 111–112.) Van Pelt returned to petitioner for prescriptions on August 28, September 4, September 8, and Sep-

tember 12, 1944. On each of the two former dates, he received one 25-tablet prescription and paid $3. On each of the two latter dates he received two such prescriptions and paid $3 for each. On no occasion was there any suggestion of an X-ray or other type of examination. (R. 112–115, 118.)

On September 8, 1944, petitioner summoned Humphries to his office and told him that he had received a call from a pharmacy at which Van Pelt had tried to fill a prescription and that the pharmacist "was under the impression that Van Pelt was an addict and was going to report him to the Narcotics Bureau." Petitioner asked Humphries "to find out about this, we don't want any trouble." The following day, September 9, Humphries returned with Van Pelt. In reference to the telephone call from the pharmacist, petitioner remarked, "Well, * * * you know how things like that are when they get started they are like a snowball. * * * We don't want to do anything to get the boys in blue around." (R. 34–35, 116–117.) On this occasion also, petitioner was told that Van Pelt "was addicted" (R. 116). Humphries remarked that "As long as I am here, Doctor, you might as well give me a prescription," and a prescription for morphine was given him (R. 117).

On September 12, 1944, following Van Pelt's receipt of two prescriptions from petitioner, for

which he paid $3 each in marked money, Belmont and another agent entered petitioner's office, identified themselves, asked him to produce the money that Van Pelt had paid him, and interrogated him (R. 154). Petitioner stated to the agents that he had no records pertaining to his patients for whom he was prescribing narcotics, but he identified such patients as Humphries, Van Pelt, an Edna Weppler, and a Mary Muller. He further stated that Humphries "had gall-bladder trouble and he was intending to operate on him * * * as soon as he came back from a trip to sea," and that Van Pelt "was suffering very terribly" from "pleurodynia." He told the agents that he had examined both Humphries and Van Pelt. (R. 154–156.) When he was asked about Edna Weppler, he stated that he had never seen her, explaining that her husband "comes here every two or three days and he gets a prescription for * * * 50 half-grain morphine tablets." When Belmont asked him how he knew such a person as Edna Weppler existed, petitioner replied, "Well, all of these folks are Dr. Brady's patients. Dr. Brady is away, I think either sick or on vacation, and I am taking care of them until he gets back." In respect of Mary Muller, petitioner stated that "She is supposed * * * to have kidney stone." Asked if he had examined her, petitioner replied, "No, * * * she is Dr. Brady's patient." A subsequent check of the addresses of Weppler and Muller, as given

by petitioner, disclosed that no such person lived at the Weppler address and that the Muller address was non-existent. (R. 156–157.) Schlossberg, the agent who participated with Belmont in the interrogation of petitioner, testified that when he asked petitioner about his records, petitioner replied, "These are the only four addicts I have" (R. 193).

Humphries and Van Pelt were given medical examinations in July and September 1944, respectively, by physicians who testified for the Government, and neither was found to be suffering from any disease or condition requiring the administration of narcotic drugs (R. 201–202, 173–176).

ARGUMENT

1. The trial judge fully and accurately instructed the jury concerning the nature of entrapment as a defense. He clearly outlined to them the distinction (see *Sorrells* v. *United States*, 287 U. S. 435, 441–442; *United States* v. *Lindenfeld*, 142 F. 2d 829, 831 (C. C. A. 2), certiorari denied, 323 U. S. 761) between a government officer's luring of a person into committing an offense he would not otherwise have committed and had no intention of committing and an officer's merely affording to a person an opportunity to commit an offense which he has reason to believe the person already had the criminal intent and design to commit, and instructed them

that the former situation would constitute the valid defense of entrapment while the latter was a legitimate method of crime detection (R. 377–379, 384). Petitioner contends, however, that the trial judge should have ruled as a matter of law that petitioner was entrapped and should not have submitted the question to the jury because "there was no evidence in the record of any previous conviction of petitioner for violating the anti-Narcotic Act or any reasonable basis for a suspicion that he had violated it or intended to violate the Act" (Pet. 6; see also Pet. 20–24, 36–41).

Apart from the fact that the issue of entrapment is at most a question for the jury, however (see *Sorrells* v. *United States, supra,* 287 U. S. at 452), the assertion that the narcotics agents had no reasonable cause to believe that petitioner had the intent or willingness to violate the narcotics laws prior to their use of Humphries and Van Pelt, himself an agent, as decoys to catch petitioner in violations is completely refuted by the record. As we have pointed out (*supra,* pp. 5–6), the investigation of the Federal Bureau of Narcotics into petitioner's narcotic practice did not begin until May 11, 1944, when Humphries talked to agent Belmont and showed him the 100-tablet prescription for morphine sulphate which petitioner had given Humphries in mid-April. This was the prescription which Humphries had been unsuccessful in having filled at the phar-

macy because of the unusually large amount of morphine it called for, and which petitioner permitted Humphries to retain notwithstanding the fact that, upon Humphries' return to petitioner's office, petitioner proceeded to write for him two smaller prescriptions which would be easier to fill (*supra*, pp. 3–5). The circumstances surrounding Humphries' procurement both of the large prescription and the two smaller ones, particularly the facts that Humphries was subjected to no examination whatever into his alleged complaint of "gallstones" and received a prescription calling for 100 tablets though he had expressed satisfaction with the 75 that petitioner at first suggested, were manifestly ample grounds to cause Belmont to believe that petitioner was engaged in violating the narcotics laws.

Petitioner's only answer in this respect is that he was acquitted on the first count, which concerned the initial prescription for 100 tablets (see note 1, p. 5, *supra*), and that this acquittal "can only mean that the jury believed the prescription was given in good faith in the regular practice of accused's profession of medicine" (Pet. 20). This argument is entirely fallacious, however, since the reason for the jury's acquittal of petitioner on this count, whatever it may have been, obviously has no relevance in respect of whether or not Belmont had reasonable cause to believe, from the circumstances surrounding Humphries' procurement of the original 100-tablet prescrip-

tion and the two subsequent 50-tablet prescriptions, that petitioner was probably violating the narcotics laws.[4]

2. Petitioner further contends that it was error for the district court to permit Humphries and Van Pelt to testify that petitioner made no examination of them prior to prescribing morphine for their alleged ills because such testimony constituted conclusions of witnesses not qualified to express opinions as to what constitutes an examination by a physician (Pet. 7, 41–44). The contention is quite without merit. If petitioner had purported to examine Humphries and Van Pelt, or had gone through a form or semblance of an examination, there might be some substance to the argument that they, as laymen, would have been unqualified to express opinions as to the adequacy of the examinations from a medical viewpoint. Here, however, both Humphries and Van Pelt testified that petitioner at no time gave them any

[4] Petitioner also urges that the prescriptions on which counts 2 to 11, on which he was convicted, were predicated "were filled by druggists on presentation by * * * Government agents and employees at Government expense" and that this fact should have precluded submission of his case to the jury (Pet. 24; see also Pet. 6, 9, 24–36). This contention is but another phase of petitioner's principal contention that he was entrapped and is clearly without merit. *United States* v. *Abdallah*, 149 F. 2d 219, 222 (C. C. A. 2), certiorari denied, 326 U. S. 724; cf. *United States* v. *Lindenfeld*, 142 F. 2d 829, 830–831 (C. C. A. 2), certiorari denied, 323 U. S. 761; *Louie Hung* v. *United States*, 111 F. 2d 325 (C. C. A. 9); *Wall* v. *United States*, 65 F. 2d 993 (C. C. A. 5).

examination whatever (*supra,* pp. 4, 7, 8–9). Whether a physician gives a "patient" any examination whatever is obviously an entirely different question from whether an examination that was given was adequate or in accordance with professional standards. The former is obviously a matter of observation that any lay witness would be qualified to answer.

3. Petitioner's next contention seems to be that since the proof showed that Humphries was a morphine addict and that Van Pelt claimed to be such an addict, and since addiction is a disease which may require, "according to fair medical standards," the giving of "moderate amounts of drugs for self-administration in order to relieve conditions incident to addiction" (*Linder* v. *United States,* 268 U. S. 5, 22), there was a fatal variance between the proof and the allegations of the indictment that Humphries (counts 2 to 6) and Van Pelt (counts 7 to 11) "did not then and there require the administration of morphine sulphate by reason of any disease" (Pet. 45–46; see also Pet. 46–48). This contention is also without merit.

It is true that it was held in the *Linder* case that the giving in good faith, according to fair medical standards, of moderate amounts of drugs for self-administration by a known addict for the purpose of relieving conditions incident to addiction does not constitute a violation of the Harrison

Narcotic Act. But in the present case the indictment did not charge, nor did the proof show, that petitioner prescribed morphine to addicts in order to relieve "conditions incident to addiction." The indictment charged that petitioner prescribed morphine "not in good faith and not in the course of his professional practice only" for persons not requiring the administration of that drug by reason of any disease, but solely in order to cater to their cravings therefor. The proof, moreover, clearly substantiated the charge. The mere fact that one of the persons for whom petitioner prescribed was in fact an addict and that he may have required the administration of moderate dosages of morphine in the course of a bona fide medical treatment is plainly without relevance here, since, as the evidence showed, petitioner did not prescribe "moderate amounts" of the drug in the course of a good-faith attempt to cure the person of his addiction, but rather that he prescribed immoderate quantities for the sole purpose of catering to his cravings. In the *Linder* case, it may be observed, the physician prescribed one tablet of morphine and three tablets of cocaine. Petitioner, on the other hand, prescribed between 2500 and 3000 tablets of morphine for Humphries alone within a period of but a few months (*supra,* p. 7)—as much and as often, in fact, as Humphries desired the drug—and under circumstances which completely negatived all possibility of professional good faith.

4. Petitioner further contends that agent Belmont's testimony to the effect that petitioner told him and agent Schlossberg on the occasion of his arrest on September 12, 1944, that he had been prescribing morphine sulphate for two patients other than Humphries and Van Pelt, one of whom he had never examined and the other of whom he had never seen (*supra*, pp. 10–11), was inadmissible and prejudicial (Pet. 7, 47, 48–49). These statements of petitioner were clearly admissible, however, as admissions against interest. They were plainly relevant to the issue of the intent and good faith with which he had been prescribing morphine for Humphries and Van Pelt. No objection to the testimony, moreover, was made at the time (see R. 156–157).[5]

[5] Petitioner's final contention that the trial court should have set aside the verdict because the wife of one of the jurors attended the trial and talked to petitioner's wife, who also attended the trial (Pet 8, 9, 49–56) is so utterly without merit that extended discussion seems unnecessary. The wife of the juror concerned testified at the hearing on the motion to set aside the verdict that she had no conversation whatever with petitioner's wife until after the jury had begun to deliberate their verdict and that the conversation she did have had nothing whatever to do with petitioner or the trial, but concerned "church dinners * * * knitting, and things in common" (R. 424–425, 427–428). Furthermore, the juror himself testified that he "absolutely and categorically" adhered to the judge's admonition, repeated continually throughout the trial, not to discuss the case with any one and not to permit any one to discuss it with him (R. 431–432). The opinion below discusses the contention in detail and, in our view, fully answers it (R. 454–456).

CONCLUSION

The judgment below is correct, there is no conflict of decisions, and the questions involved do not merit further review. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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